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No. 80-1103

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO CROSS-PETITION

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As fully set forth in the Board's petition for a writ of certiorari in *NLRB* v. *Hendricks County Rural Electric Membership Corporation* (No. 80-885), the Board found that cross-petitioner (Hendricks) violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging employee Mary Weatherman for engaging in concerted activity protected by Section 7 of the Act, 29 U.S.C. 157. During the Board proceedings, Hendricks had defended by contending, among other things, that Weatherman was not entitled to statutory protection because she was a "confidential employee" and a "personnel department employee." The Administrative Law Judge (ALJ), whose findings were adopted by the Board, found that Weatherman's duties were "deliberately restricted so as to preclude her" from any "meaningful" labor-relations

functions that would render her either a "confidential employee" or the equivalent of a "personnel department employee" (Cross-Pet. App. 45a-49a). The court of appeals sustained this finding (Cross-Pet. App. 27a), and declined to enforce the Board's order only because it held that all "confidential employees," and not merely those with access to confidential labor-related information, were excluded from the Act's coverage, and that Weatherman was a "confidential employee" under the court's broader definition of that term (Cross-Pet. App. 27a-31a, 6a-8a).

The Board's petition in No. 80-885 presents the question whether the Board properly concluded that "confidential employees" are entitled to the full protection of the Act unless they have access to confidential labor-related information. The cross-petition seeks to present, if the Board's petition be granted, the further question whether Weatherman, in any event, was excluded from the Act's coverage because she was a "personnel department employee."

Because the court of appeals rejected Hendricks' claim that Weatherman was "working in a position equivalent to a personnel department employee" (Cross-Pet. App. 27a), it is clear that the issue that the cross-petition seeks to raise is merely a factual issue, which does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, there is no merit to Hendricks' additional contention (Cross-Pet. 15-16) that the ALJ failed to rule on this issue in his decision. Although the ALJ did not discuss the issue of Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of his decision (Cross-Pet. App. 45a-49a) clearly shows that the ALJ, in finding that Weatherman did not have any access to confidential labor-related information, also found that her duties with respect to personnel

matters—such as they were—were insufficient to affect her status as an employee entitled to the full protection of the Act.[1]

For these reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1]Contrary to Hendricks' assertion (Cross-Pet. 16-19), *NLRB* v. *Allied Products Corp., Richard Brothers Div.*, 548 F. 2d 644 (6th Cir. 1977), does not "conflict" with the decision below. Indeed, the Sixth Circuit expressly applied the Board's "labor nexus" test for determining the status of confidential employees under the Act: "The Board has, with this court's approval, declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor-management negotiations to warrant exclusion of their secretaries from the benefits of collective[-] bargaining representation. * * * Furthermore, the secretaries must enjoy confidential status with respect to those labor relations functions." *Id.* at 648. In the present case, the Board found (Cross-Pet. App. 45a, 47a)—and the court of appeals agreed (Cross-Pet. App. 27a)—that General Manager Dillon's labor-relations role was too "passive," and Weatherman's duties with respect to such matters were too "restricted," to establish a "labor nexus."